Office-Supreme Court, U.S.
FILED
JAN 21 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1233

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

SYUFY ENTERPRISES,

Petitioner,

v.

NORTHERN CALIFORNIA STATE ASSOCIATION OF I.A.T.S.E. LOCALS, LOCAL UNION NO. 241,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. MARK MONTOBBIO
25th Floor
One Embarcadero Center
San Francisco, California 94111
415-398-3344

Counsel for Petitioner
Counsel of Record

Of Counsel:

SEVERSON, WERSON, BERKE & MELCHIOR
25th Floor
One Embarcadero Center
San Francisco, California 94111

QUESTIONS PRESENTED

1. Whether the decision of the Court below in holding that a party irrevocably waives its right to judicial determination of the jurisdiction of an arbitrator by submitting the question of jurisdiction to an arbitrator is contrary to federal labor policy and holdings of other Courts of Appeals.

2. Whether the Court below was in error in holding that extrinsic evidence, such as negotiations between the parties, may be used to determine the substantive provisions of a collective bargaining agreement where no ambiguity exists in the language of that agreement.

SUBJECT INDEX

	Page
QUESTIONS PRESENTED	i.
OPINION BELOW	2
JURISDICTION	2
CONSTITUTION AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
The Decision of the Court Below in Refusing to Consider the Arbitrator's Jurisdiction is in Conflict with the Decisions of Other Courts of Appeal, and Inconsistent with Federal Policies Which Seek the Resolution of Disputes Through Arbitration, and a Conservation of Judicial Resources	10
The Decision of the Court Below Improperly Authorizes an Arbitrator to Exceed his Contractual Authority by Examining Extrinsic Evidence to Vary the Terms of Unambiguous Factual Language	23
CONCLUSION	31
APPENDIX	

TABLE OF AUTHORITIES CITED

Pages

American Can Co. v. United Paper-makers and Paperworkers Union

356 F.Supp. 495 (1973) 15

Atlas Plastering, Inc. v. Superior Court

72 C.A.3d 63 (1977) 17

Boys Markets, Inc. v. Retail Clerks Union, Local 770

398 U.S. 235, 90 S.Ct. 1583 (1970) 21,22

District 50, United Mine Workers v. Pittston Company

210 F.Supp. 781 (N.D. W.Va. 1962) 15

Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers

370 U.S. 254, 82 S.Ct. 1346 (1952) 11

Ficek v. Southern Pacific Company

338 F.2d 655 (9th Cir. 1964), cert. denied, 380 U.S. 988 (1965) 11,12

Pages

Ben Gutman Truck Serv. v. Teamsters Local No. 600

484 F.Supp. 893
(E.D. Mo. 1980) 15

Humble Oil & Refining Co. v. Local Union 866

271 F.Supp. 281
(S.D. N.Y. 1967) 15

Humphrey v. Moore

375 U.S. 335, 84 S.Ct. 363
(1964) 11

International Brotherhood of Teamsters, etc. v. Washington Employers, Inc.

557 F.2d 1345 (9th Cir. 1977) 11,12

International Union of Operating Engineers v. Flair Builders, Inc.

406 U.S. 487, 92 S.Ct. 1710
(1972) 10

Local 719 American Bakery Confectionary Workers of America, AFL-CIO v. The National Buiscuit Company

378 F.2d 918 (3rd Cir. 1967) 13

Local 1115, Nursing Home, etc. v. Hialeah Conval. Home, Inc.

348 F.Supp. 405
(S.D. Fla. 1972) 15

Pages

Mobil Oil Corporation v. Local 8-766, Oil, Chemical & Atomic Workers International Union

600 F.2d 322 (1st Cir. 1979) 16

Timkin Co. v. Local U. No. 1123, United Steel Workers of Am.

482 F.2d 1012 (6th Cir. 1973) 29

Truck Drivers & Helpers Union Local 784 v. Urly-Talbert Co.

330 F.2d 562 (8th Cir. 1964) 26

United Steel Workers of America v. Enterprise Wheel & Car Corporation

363 U.S. 593, 80 S.Ct. 1358 (1960) 25

United Steel Workers of America v. Warrior & Gulf Navigation Co.

363 U.S. 574, 80 S.Ct. 1347 (1960) 11,18

Wheeler v. Saint Joseph's Hospital

63 C.A.3d 345 (1976) 17

John Wiley & Sons, Inc. v. Livingston

376 U.S. 543, 84 S.Ct. 909 (1964) 10,26

MISCELLANEOUS AUTHORITIES

	Page
28 U.S.C. §1254(1)2	2
United States Code,	
Title 9, Section 9	2
Title 29, Section 185(a)	4
Cox, Reflections Upon Labor Arbitration 72 Har.L.Rev. 1482 1508-1509 (1959)	21

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

SYUFY ENTERPRISES,	)
	)
Petitioner,	)
	)
v.	)
	)
NORTHERN CALIFORNIA STATE ASSOCIATION OF I.A.T.S.E. LOCALS, LOCAL UNION NO. 241,	)
	)
Respondent.	)

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, SYUFY ENTERPRISES (Syufy), prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit. Judgment in this matter was tendered on October 23, 1980.

OPINION BELOW

The opinion of the Court of Appeals was reported at 631 F.2d 124 (9th Cir. 1980). The decision of the United States District Court for the Northern District of California and the decision of the arbitrator are unreported. Copies of the opinions of the Court of Appeals, the District Court and the arbitrator appear in the Appendix hereto.

JURISDICTION

The opinion of the Court of Appeals was filed on October 23, 1980. On November 19, 1980, judgment was entered. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1)2.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

United States Code, Title 9, Section 9:

If the parties in their agreement have agreed that a judgment of the court shall

be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made ...

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -

* * *

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

* * *

United States Code, Title 29, Section 185(a):

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Syufy is a party to the Northern California Projectionists Master Agreement by virtue of its membership in a

multi-employer bargaining group known as The San Francisco Theatre Employers Association (Association). On December 15, 1976, Syufy, through its membership in the Association, entered into a collective bargaining agreement with the Northern California State Association of I.A.T.S.E. Locals, for and on behalf of its affiliated local union, which included Local Union No. 241 I.A.T.S.E. (the Unions). That agreement was effective from August 15, 1976 to November 15, 1980.

By its term, the agreement applied to "[the Association] all theatres contracted herein and for all future theatres that may be acquired by the employer to determine this agreement." The agreement contained a list of 35 theatres owned by Syufy, but did not include two existing theatres located in Vallejo, California. Those two theatres were owned by Syufy,

but operated by David Norwitt, d/b/a Vallejo Enterprises, pursuant to a lease agreement executed between Syufy and Norwitt on April 15, 1976.

On June 15, 1976, prior to the expiration of the predecessor agreement, lessee-operator Norwitt informed the Unions that it was disclaiming the authority of the Association to bargain on behalf of the two Vallejo theatres and in subsequent correspondence requested that the Unions meet with Norwitt to conduct separate negotiations for a new collective bargaining agreement. The parties commenced collective bargaining on October 1, 1976, and subsequently reached an impasse. On February 28, 1977, Norwitt informed the Unions that it was implementing its last and final offer. Those changes became effective March 24, 1977.

The response of the Unions was to file a grievance with Syufy under the terms of their 1976-1980 collective bargaining agreement. In the ensuing arbitration, Syufy challenged the jurisdiction of the arbitrator on the grounds that the employer of the two theatres was Norwitt, rather than Syufy, and that the two Vallejo theatres were not covered, nor intended by the parties to be covered, by the collective bargaining agreement. Syufy further argued that the grievance be denied on the merits because the unambiguous language of the agreement indicated that terms would apply only to Syufy theatres specifically listed in the agreement.

The arbitrator ruled that he had no jurisdiction over Norwitt, but that he had jurisdiction over Syufy pursuant to the so-called "intent of the parties during negotiations." On the merits, the arbitrator ruled that despite the express and

unambiguous language listing the names of the theatres covered by the agreement, the control exercised by Syufy over the two Vallejo theatres brought those theatres under the terms of the collective bargaining agreement. The arbitrator ruled that Syufy apply the terms and conditions of the agreement to the two theatres.

Syufy filed a petition in California Superior Court to vacate the arbitration award on the grounds that the agreement was limited to theatres listed in its terms, that the arbitrator was prohibited from amending or modifying the agreement by adding additional theatres, and that the arbitrator exceeded his jurisdiction by requiring Syufy to apply the contract to Norwitt's employees.

The Unions removed the matter to the United States District Court for the Northern District of California. Cross

motions for summary judgment were filed, and the Unions' motion was granted. The District Court refused to consider the question of the jurisdiction of the arbitrator on the grounds that the parties had agreed to have the arbitrator determine his own jurisdiction. On the merits, the court ruled that it was not improper for the arbitrator to go beyond the terms of the agreement and consider extrinsic evidence in arriving at his decision.

Thereafter, appeal was taken to the Ninth Circuit. The Ninth Circuit affirmed, holding in essence that Syufy had waived its right to judicial review of the arbitrator's jurisdiction (arbitrability) by allowing the arbitrator to rule on his own jurisdiction and by proceeding on the merits. The Court also held that it was proper for the arbitrator to consider evidence outside the agreement in order to decide what the parties had intended.

REASONS FOR GRANTING THE WRIT

The Decision of the Court Below in Refusing to Consider the Arbitrator's Jurisdiction is in Conflict with the Decisions of Other Courts of Appeals, and Inconsistent with Federal Policies Which Seek the Resolution of Disputes Through Arbitration, and a Conservation of Judicial Resources

It is, of course, well settled that the issue of the arbitrability of a controversy, whether the arbitrator has jurisdiction over a particular dispute, is ordinarily a question for the court to decide. While the courts can only exercise a limited review over the merits of an arbitration award, the courts are primarily charged with determining the threshhold question of whether the parties intended the dispute to be, in fact, arbitrable. International Union of Operating Engineers v. Flair Builders, Inc., 406 U.S. 487, 491, 92 S.Ct. 1710, 32 L.Ed.2d 248 (1972); John Wiley & Sons, Inc. v. Livingston,

376 U.S. 543, 546-547, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964); Humphrey v. Moore, 375 U.S. 335, 345, n. 8, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964); Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers, 370 U.S. 254, 256, 82 S.Ct. 1346, 8 L.Ed.2d 474 (1952); United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 409 (1960).

Despite this well-established rule, the court below held that Syufy cannot obtain judicial determination of arbitrability once it proceeded to arbitration and allowed the arbitrator to rule on his own jurisdiction. This position was based on the Ninth Circuit's prior rulings in Ficek v. Southern Pacific Company, 338 F.2d 655 (9th Cir. 1964), cert. denied, 380 U.S. 988 (1965), and International Brotherhood of Teamsters, etc. v. Washington Employers, Inc., 557 F.2d 1345 (9th Cir. 1977). In

Ficek, supra, the Court affirmed the summary judgment against an employee seeking damages in a breach of contract action, upon the grounds the employee through his union had previously submitted his claim to an arbitrator. The Ninth Circuit rejected Ficek's claim and that the arbitrator was without jurisdiction and broadly declared:

> A claimant may not voluntarily submit his claim to arbitration, await the outcome, and if the decision is unfavorable, then challenge the authority of the arbitrator. (338 F.2d at 657)

In Washington Employers, supra, the Ninth Circuit noted that although arbitrability was ordinarily a question for the court, that issue could be submitted to binding arbitration by the parties, and citing Ficek, held that the employer could not challenge an arbitrator's jurisdiction before the Court if the employer had earlier agreed to allow the arbitrator to hear the dispute.

These decisions by the Ninth Circuit are in conflict with the well-reasoned doctrine by the majority of courts in various circuits which hold that as arbitrability is a contractual matter subject to judicial determination, such judicial review is not waived merely by presenting the issue of arbitrability to the arbitrator or by proceeding on the merits. Representative of this majority opinion is the decision of the Third Circuit Court of Appeals in Local 719 American Bakery Confectionary Workers of America, AFL-CIO v. The National Biscuit Company, 378 F.2d 918 (3rd Cir. 1967). In Bakery Workers, the Third Circuit specifically rejected the argument that the employer forfeited its right to contest jurisdiction of the arbitrator in the judicial forum by agreeing to submit that issue to the arbitrator, and by participating on the merits once

the arbitrator ruled in favor of his own jurisdiction. The Third Circuit declared:

> Thus the Company's argument that the Union is now precluded from challenging arbitrability depends on our adoption of a rule that would require a party disputing the issue to get an injunction against arbitration before the proceedings commence, or to refrain from participating in that issue, or to seek court action immediately upon an arbitrator's affirmation of his own jurisdiction, at the penalty of waiver. No such procedure is required by statutory or decisional law, and in a few instances where a party has though to impute a waiver of judicial jurisdiction in this manner, the argument has been found meritless. In our own federal litigation system, we require no special jurisdictional appearances and permit no interlocutory appeals from a court's decision in favor of its jurisdiction. Since federal labor policy with respect to arbitration favors the establishment of a private juriditial system, there is even less reason to make resort to interstital activity mandatory, when the possibility exists that a labor dispute can be settled by any use of the courts whatsoever. Thus, where as here the reluctant party has presented its objection to arbitrability to the arbitrator and has not thereafter clearly indicated its willingness to forego judicial review, we believe that the issue is sufficiently preserved by a subsequent inquiry. [Footnotes omitted.] 378 F.2d at 921-922.

This reasoning is followed by courts within the Second Circuit, American Can Co. v. United Papermakers and Paperworkers Union, 356 F.Supp. 495, 497, n. 1. (E.D. Pa. 1973); Humble Oil & Refining Co. v. Local Union 866, 271 F.Supp. 281 (S.D. N.Y. 1967); within the Fourth Circuit, District 50, United Mine Workers v. Pittston Company, 210 F.Supp. 781, 786 (N.D. W.Va. 1962); within the Fifth Circuit, Local 1115, Nursing Home, etc. v. Hialeah Conval. Home, Inc., 348 F.Supp. 405, 408-410 (S.D. Fla. 1972); and most recently in the Eighth Circuit, Ben Gutman Truck Serv. v. Teamsters Local No. 600, 484 F.Supp. 893, 896 (E.D. Mo. 1980).

The First Circuit has held that a court must first independently consider the issue of arbitrability in an action to enforce an arbitrator's award. Thus, the First Circuit has implicitly followed the holdings in

the Second, Third, Fourth, Fifth and Eighth Circuits. In Mobil Oil Corporation v. Local 8-766, Oil, Chemical & Atomic Workers International Union, 600 F.2d 322, 325 (1st Cir. 1979), the Court declared:

> We agree with Mobil that the District Court limited itself to a review of the arbitrator's decision. The only logical interpretation that can be given to the italicized sentence is that the District Court misunderstood its duty to decide independently the question of arbitrability and erroneously deferred to the arbitrator's determination that the subcontracting dispute was arbitrable ... . This, however, referred only to the second step of the arbitrator's review process. The first step is a determination of the arbitrability of the dispute. While the court may refer to an arbitrator's decision on arbitrability in order to aid its determination, it must make it its own independent determination of this threshhold issue. [Footnotes omitted, citations omitted; emphasis added.]

The California courts where this action first arose have long held that parties must present all issues to the arbitrator first, deferring litigation over jurisdiction and arbitrability to subsequent proceedings to

enforce or vacate the award. A California court of appeal has specifically noted that "[T]he preferred procedure is to proceed by arbitration and attack confirmation on appeal." Atlas Plastering, Inc. v. Superior Court, 72 C.A.3d 63, 67 (1977); Wheeler v. Saint Joseph's Hospital, 63 C.A.3d 345 (1976).

In the instant matter, Syufy did not fully indicate a willingness to forego judicial review. Nowhere did Syufy agree that the arbitrator's ruling on his own jurisdiction would be final. Syufy merely permitted the arbitrator to rule on his own jurisdiction, and produced evidence on the merits of the grievance. Under the majority rule, as indicated above, this is insufficient to create a waiver to judicial review.

As the Ninth Circuit's decision below conflicts with majority rule by other

courts, including the First and Third Circuits and district courts within the Second, Fourth, Fifth and Eighth Circuits and the California courts of appeal, this petition for certiorari should be granted. Availability of judicial review of the arbitrability of a dispute is a recurring issue in labor relations, and one whose answer should not depend upon the circuit in which it arises.

In addition to the fact that the Ninth Circuit's ruling is in conflict with that of most other federal courts, the rule is also contrary to the established Congressional policy favoring the resolution of industrial disputes through voluntary arbitration. See generally, United Steel Workers v. Warrior & Gulf Navigation, supra. The Ninth Circuit's position requires that whenever a party questions the authority of an arbitrator to hear a

dispute, it must seek an injunction to prevent the arbitration, or force the grieving party to obtain an affirmative injunction compelling arbitration. The party challenging the arbitrability of a dispute cannot voluntarily present that issue to the arbitrator in the hopes of obtaining a favorable ruling and thus an end to the controversy. Nor can such a party, if it loses before an arbitrator on an issue of arbitrability, proceed on the merits and possibly end the dispute in that manner with a favorable ruling. Rather, under the Ninth Circuit's approach, where a party feels the arbitrator lacks jurisdiction, it must avoid an arbitration proceeding at all costs, thereby avoiding a speedy resolution of the controversy through arbitration. In California, the party asserting the issue of arbitrability cannot obtain review before the Ninth Circuit but if the matter is left in

state court, appellate review will follow. By forcing the parties into court before arbitration in all instances where an arbitrator's authority is at question, judicial resources are not conserved. Moreover, Congressional policy encouraging arbitration is thwarted.

The Ninth Circuit's approach is also directly inconsistent with the role the courts are intended to play with respect to arbitration. Under the Ninth Circuit rule, where an arbitrator is given authority by the parties to rule on his own jurisdiction, the arbitrator's ruling on jurisdiction becomes unreviewable. Although the courts are expected to defer to the arbitrator's special expertise in deciding the merits of the grievance, the courts are charged with the duty of reviewing a disputed award in order to ensure that there has not been an improper extension of the arbitrator's powers. The courts in simple terms are expected to

oversee the process to protect against abuse and to ensure, in contract terms, that the parties have not been forced to receive more than they bargained for. By holding that an arbitrator's decision under his own jurisdiction is unreviewable, the Ninth Circuit's ruling abrogates the protection the courts are intended to give to the parties and in effect gives the arbitrator unlimited power "to impose obligations outside the contract limited only by his understanding and conscience." Cox, Reflections Upon Labor Arbitration, 72 Har.L.Rev. 1482, 1508-1509 (1959).

Finally, the Ninth Circuit's ruling has an effect of prolonging industrial strikes. In cases involving a Boys Market injunction to halt a strike in breach of contract, the quid pro quo is the willingness of both sides to submit the dispute to arbitration. Boys Markets,

Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970). Here, the Ninth Circuit is fomenting labor strife by forcing a party to forego the protection from strikes accorded under a collective bargaining agreement or to irrevocably waive its right to contest the threshhold question of arbitrability. The Ninth Circuit's approach requires a party challenging the arbitrator's jurisdiction to go into court before an arbitration proceeding is commenced. By requiring intervention of the court at an early stage of an industrial dispute, that dispute is both intensified and prolonged. The purpose of arbitration, in short, is to prevent that exact result.

The Decision of the Court Below Improperly Authorizes an Arbitrator to Exceed his Contractual Authority by Examining Extrinsic Evidence to Vary the Terms of Unambiguous Factual Language

In the instant matter, the party's collective bargaining agreement contained language stating the contract would be "binding on the employer for all theatres contracted herein and for any future theatres that may be acquired by the employer during the term of this Agreement." An Appendix to the Agreement entitled "Appendix of Existing Locals, Employers and Theatres covered by this Agreement as of August 15, 1976" listed 35 theatres owned by Syufy but did not list the two Vallejo theatres. Despite this clear contractual language, the arbitrator ruled that the two Vallejo theatres were covered by the Agreement. The arbitrator based his ruling upon extrinsic evidence

outside the language of the contract, such as bargaining history.

In presenting the issue to the District Court and the Ninth Circuit, Syufy argued that the arbitrator's utilization of extrinsic evidence to "interpret the meaning" and expand upon unambiguous language, was a decision outside the essence of the collective bargaining agreement. Both courts below rejected this argument broadly holding in essence that whenever parties have a dispute over the terms of a collective bargaining agreement, extrinsic evidence may be considered by the arbitrator to determine the intention of the parties regardless of the language in the contract.

These holdings misconstrue the nature of an arbitrator's authority. It is, of course, true that it is an arbitrator's instruction that is bargained for and,

therefore, the courts have no basis overruling on the merits because their interpretation of the contract is different than his. United Steel Workers of America v. Enterprise Wheel & Car Corporation, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). Nonetheless, arbitrators do not have complete discretion in ordering the relationship of the parties under the agreement. Rather, the arbitrator's discretion is limited by the terms of the agreement. As this Court stated in Enterprise Wheel & Car Corporation, supra, 363 U.S. at 597:

> ... an arbitrator is confined to interpretation and application of the collective bargaining agreement. He does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from any sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to choose enforcement of the award.

The above well-settled doctrine indicates that the arbitrator's ultimate responsibility in regulating the relationship between the parties is to apply and effectuate the terms of the agreement, as such is the final embodiment of the parties' intent. Consequently, this Court has indicated that as arbitration is a matter of contract, "the answer to the question must lie within the four corners of the agreement between the parties." Truck Drivers & Helpers Union Local 784 v. Urly-Talbert Co., 330 F.2d 562, 563 (8th Cir. 1964), citing John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964).

Contrary to the opinion of the courts in the matter below, an arbitrator is not entitled to look to extrinsic evidence to "interpret" the provisions of a collective bargaining agreement whenever a dispute arises simply because such extrinsic

evidence may exist. The parties bargained for authority to resolve the suit based upon the terms of the collective bargaining agreement. The terms of such an agreement are often facially clear in their exact meaning. In such instances, the only procedure is for the arbitrator to simply apply that clear meaning. There is absolutely no reason for the arbitrator to take another step and look at extrinsic evidence as may exist.

Use of extrinsic evidence is thus only necessary where the simple words of the agreement do not in and of themselves resolve the parties' dispute. An arbitrator can go outside the terms of an agreement in only two instances. First, where the contract is silent on a disputed issue. In such a case an arbitrator can properly examine extrinsic evidence such as the past relationship between the parties and common industrial practice for guidance. Secondly,

extrinsic evidence may be helpful to interpret ambiguous language in a collective bargaining agreement. The language of a collective bargaining agreement is ambiguous when such language is on its face inexact. Contrary to the Ninth Circuit, here the terms of the collective bargaining agreement are not ambiguous simply because the parties disagree over their interpretation. Disputes can arise over the meaning of exact language. Yet, even where contractual language is inexact, extrinsic evidence is merely a source of interpretation of the terms of that language. The extrinsic evidence cannot somehow supercede clear, concise contractual terms or be used by an arbitrator to interpret the contractual language in a contradictory or unnatural way. It is in such cases that the arbitrator's ruling is not within the "essence" of the agreement

and such rulings must be overturned. Accordingly, a distinction must be made between ambiguous and unambiguous contractual language when extrinsic evidence is used by an arbitrator. Indeed, where contractual language is unambiguous, any attempt to bury its clear meaning through use of extrinsic evidence is by its very nature outside the "essence" of the agreement.

The Ninth Circuit's ruling below abolishes this critical distinction, despite the fact that other courts recognize its validity. For example, in Timkin Co. v. Local U. No. 1123, United Steel Workers of Am., 482 F.2d 1012, 1014-1015 (6th Cir. 1973), the Sixth Circuit declared:

> We conclude that the Arbitrator exceeded his authority in finding as he did. The "voluntary quit" provision in the agreement specifically applies to circumstances of "an unauthorized absence for seven (7) consecutive work days." Consequently, there was no need to go outside the record to consider other definitions

> of the term "quit". A collective bargaining agreement is after all a contract and the arbitrator is limited to the interpretation and application of that contract. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964).

In the instant matter, the contractual language defining the scope of the agreement is clearly unambiguous, and no court below specifically found to the contrary. Accordingly, by ignoring the distinction between ambiguous and unambiguous contractual language, the Ninth Circuit's ruling below misconstrues and thus raises serious qustions about the proper scope of an arbitrator's authority to consider extrinsic evidence.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit. Alternatively, the matter should be remanded for further consideration.

DATED: January 20, 1981.

Respectfully submitted,

J. MARK MONTOBBIO
25th Floor
One Embarcadero Center
San Francisco, California 94111

Counsel for Petitioner

Of Counsel:

SEVERSON, WERSON, BERKE & MELCHIOR
25th Floor
One Embarcadero Center
San Francisco, California 94111

APPENDIX

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1980

SYUFY ENTERPRISES,

Petitioner,

vs.

NORTHERN CALIFORNIA STATE
ASSOCIATION OF I.A.T.S.E.
LOCALS, LOCAL UNION NO. 241,

Respondent.

APPENDIX TO A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

J. Mark Montobbio
25th Floor
One Embarcadero Center
San Francisco, CA 94111
Counsel for Petitioner

Of Counsel:

SEVERSON, WERSON, BERKE & MELCHIOR
25th Floor
One Embarcadero Center
San Francisco, California 94111

Filed October 23, 1980
Richard H. Deane, Clerk, U.S.
Court of Appeals

Received November 10, 1980
Severson, Werson, Berke & Melchior

In the United States Court of Appeals
For the Ninth Circuit

SYUFY ENTERPRISES, Petitioner-Appellant, v. NORTHERN CALIFORNIA STATE ASSOCIATION OF IATSE LOCALS AND LOCAL UNION #241, Respondents-Appellees.	)	No. 78-3010 OPINION

Appeal from the United States
District Court for the Northern
District of California

Honorable Samuel Conti,
District Judge

Argued and Submitted,
August 14, 1980

Before: CHOY and FARRIS, Circuit Judges,
and EAST,* District Judge

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

PER CURIAM:

Syufy appeals the District Court's confirmation of the Labor-Management Agreement award. We note jurisdiction and affirm.

In 1976, the collective bargaining agreement between the parties expired. During negotiations for a new agreement, an issue arose whether the Cine 21 theater and the Vallejo Auto Movies, two theaters that had been leased by Syufy to David Norwitt in April 1976, were to be covered by the new agreement. The parties were unable to resolve the question and, therefore, excluded the theaters from the list of theaters covered by the agreement and agreed to resolve the dispute through "litigation."

After a wage dispute arose at the two unlisted theaters, the Union claimed that the theaters were subject to the agreement, filed a grievance, and pursuant to the arbitration clause of the agreement, demanded arbitration. Syufy challenged the jurisdiction of the arbitrator on the ground that the theaters were not subject

to the agreement, but agreed to have the issue decided by the arbitrator. The arbitrator ruled that the two theaters were subject to the agreement and ordered Syufy to make the employees whole for any losses.

Syufy filed a petition in California Superior Court to vacate the award on the ground that the theaters were not subject to the agreement. The Union removed the case to the District Court and filed a cross-petition to confirm the award. On cross-motions for summary judgment, the District Court confirmed the award.

The appeal presents two issues:

1. Did the arbitrator have jurisdiction to enter the order?

2. Was the arbitrator's decision drawn from the essence of the contract?

Discussion:

Issue 1.

Arbitration is a matter of contract. Since the parties stipulated that the arbitrator could decide whether the two

theaters were covered by the agreement, Syufy cannot contend that the arbitrator lacked jurisdiction to decide the issue. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); International Brotherhood of Teamsters v. Washington Employers, Inc., 557 F.2d 1345, 1349 (9th Cir. 1977). Syufy's argument that because the two theaters were not listed in the agreement the arbitrator lacked jurisdiction is rejected.

Issue 2.

An arbitration award is legitimate so long as it draws its essence from the collective bargaining agreement and does not manifest an infidelity to the agreement. Riverboat Casino, Inc. v. Local Joint Executive Board, 578 F.2d 250, 251 (9th Cir. 1978).

Syufy argues that since the agreement does not specifically cover the two subject theaters, the arbitrator's decision lacks fidelity to the agreement. The argument is rejected because it was entirely proper for the arbitrator in this case to consider the relevant bargaining history in order to

decide what the parties intended.

A collective bargaining agreement is different in nature, scope, and purpose from the ordinary commercial contract. Its purpose is to establish a system of industrial self-government. "It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." Warrior & Navigation Co., 363 U.S. at 578. The words in such an agreement must be understood in the context of the history of the negotiations which gave rise to their inclusion. Steelworkers v. American Mfg. Co., 363 U.S. 564, 570 (1960) (Brennan, J., concurring).

Courts and arbitrators may rely upon extrinsic evidence to interpret various aspects of collective bargaining agreements. In United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. at 581, 582, for example, the court said: "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law--the practices of the industry and the shop--is equally a part of the collective bargaining agreement

although not expressed in it." This Court has previously held that it is proper for courts to consider evidence of the intent of the parties, particularly bargaining history, in determining the scope of arbitration clauses. Haig Berberian, Inc. v. Cannery Warehousemen, 535 F.2d 496, 499 (9th Cir. 1976); Pacific Northwest Bell Telephone Co. v. Communication Workers of America, 310 F.2d 244 (9th Cir. 1962).

Similarly, the arbitrator may look to the negotiating history for assistance in interpreting [1/] the substantive provisions

---

1/ This case is distinguishable from Boise Cascade Corp. v. United Steelworkers of of America, etc., 588 F.2d 127, cert. denied, 444 U.S. 830 (1979). That case involved the interpretation of provisions of a contract relating to employees who were assigned to or elected to take jobs which carried lower rates of pay than their regular jobs. The arbitrator found that the provisions in question were ambiguous, and relied upon extrinsic evidence to resolve the ambiguity in favor of the union. The employer argued on appeal that the consideration of extrinsic evidence was improper because it violated the arbitration clause of the agreement, which prohibited the arbitrator from adding to, detracting from, or altering in any way any provision of the contract. The court

of the bargaining agreement. See e.g., Peerless Pressed Metal Corp. v. International Union of Electrical, Radio and Machine Workers, 451 F.2d 19, 21 (1st Cir. 1971).

The arbitrator in this case found that with regard to the two theaters, the parties agreed that the "application of the contract . . . is in dispute, and/or subject to litigation, the outcomezof which will determine this issue." The dispute centered upon the issue of whether Syufy was the employer at those theaters. It was this issue to which the arbitrator addressed himself, finding that Syufy was in fact

---

1/ (Continued)

rejected that contention, holding that where the contract provision in question was arguably ambiguous, the arbitrator's consideration of extrinsic evidence did not violate the "no additions or alterations" clause. Boise did not hold that a finding of ambiguity in the contract is prerequisite to the consideration of extrinsic evidence where the contract contains no provisions prohibiting "additions or alternations." The collective bargaining agreement between Syufy and the Union contained no such provisions.

the employer. The arbitrator concluded that Syufy was subject to the agreement; thus impliedly finding that the parties intended to subject the two theaters to the agreement if Syufy was found to be the employer.

We do not hold that an arbitrator may rely upon negotiating history to contradict express provisions of a collective bargaining agreement. The arbitrator in this case relied upon credible, documentary evidence of the party's intent to extend the coverage of the contract, not to contradict it.

Under these circumstances, we do not find that the arbitrator's decision lacks fidelity to the agreement. The judgment entered by the District Court on July 17, 1978, is AFFIRMED.

Filed July 14, 1978
William L. Whittaker, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SYUFY ENTERPRISES, a limited partnership, Petitioner, -vs- NORTHERN CALIFORNIA STATE ASSOCIATION OF I.A.T.S.E. LOCALS and LOCAL UNION NO. 241, unincorporated associations, Respondents.	)	No. C-77-2907SC DECISION
NORTHERN CALIFORNIA STATE ASSOCIATION OF I.A.T.S.E. LOCALS and LOCAL UNION NO. 241, unincorporated associations, Cross-petitioners, -vs- SYUFY ENTERPRISES, a limited partnership, Cross-Respondent.	)	

This action is brought to review an arbitrator's award arising from a labor dispute between petitioner, Syufy Enterprises (Syufy), and respondent, the Northern California State Association of I.A.T.S.E. Locals, and Local Union No. 241 (the Union). 1/ Syufy seeks to vacate the arbitrator's award, while the Unions seek an order confirming the award. Each party has filed a motion for summary judgment. As will appear, this action can be properly resolved on the summary judgment motions. See International Association of Machinists v. Texas Steel Co., 538 F.2d 1116, 1119 (5th Cir. 1976).

The arbitration decision concerned the applicability of the collective bargaining agreement between Syufy and the Unions to certain theatres located in Vallejo, California. The main issues before the arbitrator were whether the arbitrator had jurisdiction over Norwitt (the theatres' lessee) and the two theatres and whether the collective bargaining agreement applied to the two theatres owned by Syufy but leased to Norwitt.

The arbitrator found that he had jurisdiction over the two theatres and found that the theatres were bound by the terms of the bargaining agreement. The issue before the court is whether the questions decided by the arbitrator were in fact arbitrable and whether the decision "draws its essence from the collective bargaining agreement." United Steelworkers v. Enterprise Corp., 363 U.S. 593, 597 (1960); International Ass'n of Machinists v. Texas Steel Co., supra; General Drivers & H.U., Local No. 554 v. Young & Hay Transp. Co., 522 F.2d 562 (8th Cir. 1975). 2/

1. Arbitrability

On the question of arbitrability, if the arbitrator is given the power by agreement of the parties to decide the questions of his own jurisdiction and the applicability of the collective bargaining agreement to the two theatres, then the court is limited in its review to deciding whether the parties agreed to the conferral of such power. See International Brotherhood of Teamsters, Etc. v. Wash. Employers, Inc., 557 F.2d 1345 (9th Cir. 1977). It is clear from the transcript of the hearing

before Arbitrator Barsamian that the parties agreed that the arbitrator could decide the question whether he had jurisidiction over Norwitt and the two theatres as well as whether the collective bargaining agreement applies to these theatres. See Respondent's Exhibit A, p.1 of transcription. While petitioner may not have had to stipulate to such arbitrability, having once done so, he cannot now complain that the arbitrator lacked jurisdiction to decide these very issues. See International Brotherhood of Teamsters, Etc. v. Wash. Employers, Inc., supra; Ficek v. Southern Pacific Co., 338 F.2d 655 (9th Cir. 1964), cert. denied, 380 U.S. 988 (1965).

2. The "essence requirement".

After review of the record the court concludes that the determination by the arbitrator that he had jurisdiction over the two theatres and that the collective bargaining agreement applied to the two theatres is rational, sufficiently grounded in the bargaining agreement, and cannot be described as "so palbably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." Inter-

ternational Union of Elec., Radio & Machine Wkrs. v. Peerless Pressed Metal Corporation, 489 F.2d 768, 769 (1st Cir. 1973), quoting Safeway Stores v. Bakery Workers Local 111, 390 F.2d 79, 82 (5th Cir. 1968). See findings of Arbitrator Barsamian, Decision p.14: 5-18; p.15: 15-32; p.16: 24-29.

Petitioner, however, contends that it was error for the arbitrator to go beyond the collective bargaining agreement and consider other evidence in arriving at his decision. To rely on such evidence outside the collective bargaining agreement, i.e., negotiations with respect to the new contract, the side agreement with respect to resolution of the coverage dispute, the bargaining history of the parties, the relationship of Syufy and Norwitt, does not mean, as petitioner seems to contend, that the arbitrator has added terms to the agreement. See United Steelworkers of America v. United States Gypsum Co., 492 F.2d 713, 731-732 and cases cited therein (5th Cir. 1974). Where disagreement existed concerning the meaning of the term "all theatres contracted herein" in Article I, section 1 of the collective bargaining agreement, especially

in light of Union Exhibits 1, 5, & 9, a dispute existed between the parties concerning "application or interpretation" of the agreement, and the matter was one to be resolved by the arbitrator. See Haig Berberian, Inc. v. Cannery Warehousemen, 535 F.2d 496, 499 (9th Cir. 1976). In order to render an informed judgment on the applicability of the agreement, it was entirely proper, necessary in fact, for the arbitrator to consider all relevant evidence in arriving at a decision on this question. See United Steelworkers v. Enterprise Corp., supra; Teamster Local Unions v. Braswell Motor Freight Lines, 392 F.2d 1, 7 (9th Cir. 1968).

The Unions have included a prayer for attorney's fees incurred in securing enforcement of the arbitration award. Absent a specific statute authorizing award of attorney's fees or a showing of bad faith by the losing party, the Union cannot recover attorney's fees in this litigation. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247-271 (1975); General Drivers, Etc. v. Sears, Roebuck & Co., 535 F.2d 1072 (8th Cir. 1976). No statutory authority exists

for such an award. The record does not support a finding of bad faith. Accordingly, neither party is entitled to an award of attorney's fees in this action.

In accordance with the foregoing, it is hereby ordered that the Unions' motion for summary judgment is denied. The arbitration award of Arbitrator Barsamian dated August 10, 1977, is hereby confirmed.

Dated: July 14, 1978.

Samuel Conti
United States District Judge

1/ A petition to vacate arbitration award was filed in the Superior Court in San Francisco in December, 1977, by Syufy. Pursuant to 28 U.S.C. §1441(b) the petition was removed to this court. Jurisdiction is founded upon Section 301 of the Labor Management Relations Act, 28 U.S.C. §185.

2/ In the case at bar federal law is the applicable body of law. International Assoc. of Bridge etc. Workers v. Superior Court, 80 Cal. App. 3d 346 (1978).

Filed August 10, 1977
Armon Barsamian, Arbitrator

IN ARBITRATION PROCEEDINGS PURSUANT
TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy between NORTHERN CALIFORNIA STATE ASSOCIATION OF I.A.T.S.E. LOCALS, for and on behalf of its affiliated LOCAL UNION NO. 241, and SYUFY ENTERPRISES. Involving 1) Whether or not the Arbitrator has jurisdiction over Norwitt and Cine 21 and Vallejo Auto Movies; and 2) Whether Joint Exhibit No. 1 applies to Cine 21 and Vallejo Auto Movies.	ARBITRATOR'S OPINION AND AWARD

This Arbitration arises pursuant to Agreement between NORTHERN CALIFORNIA STATE ASSOCIATION OF I.A.T.S.E. LOCALS, for and on behalf of its affiliated LOCAL UNION NO.

241, hereinafter referred to as the "Union", and SYUFY ENTERPRISES, hereinafter referred to as the "Employer" or "Syufy", under which ARMON BARSAMIAN was selected to serve as Arbitrator and under which his Award shall be final and binding upon the parties.

Hearing was held June 2, 1977, in San Francisco, California. The parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of relevant exhibits, and for argument. Both parties filed post-hearing briefs.

APPEARANCE:

On behalf of the Union:

Messrs. VAN BOURG, ALLEN, WEINBERG & ROGER, by MICHAEL B. ROGER, Esq. 45 Polk Street, San Francisco, California 94102

On behalf of the Employer:

Messrs. ANGELL, ADAMS & HOLMES, by SAMUEL L. HOLMES, Esq., 115 Sansome Street, Suite 1400, San Francisco, California 94104

ISSUES

1. Whether or not the Arbitrator has jurisdiction over Norwitt and Cine 21 and Vallejo Auto Movies.

2. Whether or not Joint Exhibit No. 1 applies to Cine 21 and Vallejo Auto Movies; and, if so, what should be the remedy?

FACTS

The Employer is a party to the Northern Projectionists Master Agreement (Contract) between the San Francisco Theatre Employers Association (Association) and the Union. The term of the present Contract is August 15, 1976, to November 15, 1980 (JX 1).

During the course of negotiations leading to the present Contract, the status of five theatres came into question as to whether they should be included or excluded from coverage under the Contract. Among the five theatres are the Cine 21 and Vallejo Auto Movies. So as not to hinder negotiations, the parties agreed that the "application of the Contract . . . is in dispute, and/or subject to litigation, the outcome of which will determine this issue."

(UX 5). A side letter was to have been executed concerning those five theatres, however, the December 28, 1976, letter from counsel for the Union to the Association Representative was never acknowledged and accepted (UX 1). *

On April 15, 1976, the Employer leased to Attorney David Norwitt, doing business as Vallejo Enterprises, the two theatres in question (EX 17 and EX 18). Also on April 15, the Employer and Norwitt executed what is commonly referred to as an Administration Agreement (EX 19). Among other things, that Agreement provides that for a certain fee, which is a percentage of the gross receipts at each of the theatres, the Employer will perform administrative services which ". . . shall include, where applicable, executive supervision of operations, negotiation for and entering into

---

*/ The fact the December 28, 1976, side letter was never acknowledged and accepted by the Association Representative is irrelevant and immaterial as both parties signed Union Exhibit 5 on December 15, 1976, and that Exhibit clearly indicates the intention of the parties.

contracts for pictures, buying of merchandise, keeping of the account books and records, and maintenance of a general office of the Company in San Francisco." (EX 19, Paragraphs 5 & 6).

The execution of the leases and Administration Agreement took place four months prior to the termination of the predecessor collective bargaining agreement between the Association and the Union. On June 15, 1976, Norwitt wrote to John Forde of the Union indicating, inter alia, that "I own the Cine 21 of (sic) Valljo auto movies in Vallejo, California. I would like to go on record as stating that the San Francisco Theatre Owners Association is not authorized to negotiate for me insofar as a contract is concerned." (UX 7). That letter led to an exchange of correspondence between Norwitt and counsel for the Union (UX 8, 9, 10 and 21 and EX 10 and 15). In his August 15, 1976, letter to counsel for the Union (EX 15), Norwitt states, in part, "I do not want to be bound by the industrywide agreement. I am available at any mutually convenient time to conduct negotiations. Until we can conclude a new agreement, I

will continue with the terms of the present contract."

The result of these communications was that commencing on October 1, 1976, Norwitt and the Union met in a series of negotiating sessions in an attempt to arrive at a collective bargaining agreement (EX 1 through EX6). Certain of these negotiating sessions were concurrent with the negotiations that were taking place between the Association and the Union for a new Contract. A few were subsequent to the execution of the Contract in December 1976.

Although executed in December 1976, the terms of the new Contract were retroactive to August 15, 1976. The Vallejo drive-in began paying the new Contract rates and also picked up the retroactivity obligations. The Employer's evidence is that an administrative error occurred which was later corrected (EX 7).

On February 28, 1977, counsel for Norwitt wrote to counsel for the Union and, inter alia, advised:

"4. Since each party has rejected the last offer of the other, and no new offer is pending, we consider the negotiations to have reached an impasse.

"5. Please consider this letter a formal notice that (as stated at the meeting of February 24, 1977) Mr. Norwitt will institute the wages set forth in his last offer, to wit, $5.00 per hour for the regular projectionists and $4.25 per hour for the relief projectionists, beginning with the payroll period commencing March 16, 1977, with other provisions of the contract remaining the same for a period of 18 months." (EX 7).

On March 24, 1977, Norwitt wrote to Alan Steuer, Controller for Syufy, and requested that Syufy, as administrator of Norwitt's payroll, institute the wage changes cited above (EX 27). The wage reductions were put into effect as directed by Norwitt.

Shortly thereafter, the Union filed an unfair labor practice charge in Case No. 20-CA-12596. On April 13, 1977, the Regional Director for Region 20 of the NLRB deferred action on the charge pursuant to the Board's decision in Collyer Insulated

Wire, 192 NLRB no. 150 and its policy thereunder.

POSITION OF EMPLOYER

Jurisdiction

It is obvious that personal jurisdiction over Norwitt does not exist. He has not been served with a grievance; he has not participated in any grievance procedure that might imply submission to jurisdiction; and no contract executed by him has been produced by which he has agreed to submit to the Arbitrator's jurisdiction. Jurisdiction over the theatres, which the Union claims, is simply another way of claiming jurisdiction over Norwitt.

There is no such thing as in rem jurisdiction over the theatres. The authority of an arbitrator is contractual. It derives solely from the consent of the parties to an agreement that he shall be authorized under certain carefully circumscribed conditions to tell definitely what their agreement means and what should be done to comply with that meaning. Such authority is strictly in personam. Therefore, whether the Arbitrator can determine

that the Contract applies to the two theatres depends on whether the jurisdiction over Syufy under that Contract includes, by the terms of the Contract itself, the power to find that Syufy agreed that the Contract applied to those two theatres and has not acted accordingly. To do that it must be shown first from the Contract itself that Syufy and the Union mutually intended that it should apply to the two theatres, and second, that Syufy violated the Contract by its arrangement with Norwitt. Only after finding adverse to Syufy on those factual issues would it be necessary or proper to consider a remedy, which would be limited to a direction to Syufy, not Norwitt.

For those reasons, this case boils down to the questions of whether Syufy agreed, by the execution of the Contract, to subject the Vallejo theatres to its provisions, and whether the operation of the theatres by Norwitt is a fraud which can be disregarded in order to find that Syufy is in fact the employer of the projectionists.

On the Merits:

The Contract is not ambiguous. It covers specified theatres, the Vallejo

houses not being among them. Syufy leased the theatres effective April 15, 1976, four months before the expiration of the old agreement. Thus, they never became subject to the 1976 Association negotiations. The Union argued that they should have been and reserved its right to so argue, but the inclusion of employees in a bargaining unit requires mutual affirmative agreement or an NLRB order. Moreover, reserving the right to argue about it is mere huffing and puffing. Therefore, from the face of the Contract itself, the grievance must be denied.

There can be nothing more inconsistent with the Union's claim in this case than its actual negotiations with Norwitt. If Syufy were the employer, and the Contract applicable, the correspondence and bargaining with Norwitt is wholly unexplainable. It is inconceivable that this Union, represented by an intelligent and experienced official and a highly skilled and respected attorney, would participate in a purposeless charade for eight or nine months in bargaining with Norwitt.

It was explained by Norwitt at the first meeting with the Union that Syufy was doing the bookkeeping, advertising and general administration, but that the managers of the theatres were paid by him and did the hiring and the firing of the employees. Moreover, although Forde asserted, after three and a half months of negotiations, that the Union's position was that the arrangement was a subterfuge, he was willing to take Norwitt's offer back to the Union and the parties continued to discuss a Norwitt contract.

At the hearing, the Union undertook to prove that the theatres are in fact Syufy theatres. In order to prove that, the Union must show that the oepration by Norwitt is a sham or an outright fraud. The Union's offer of documents on the Syufy letterhead as proof that the theatres are actually Syufy operations was easily explained away. Notices to projectionists were necessary because they were directly connected with the exhibition of pictures booked under the Administration Agreement. Sending the information through Norwitt, rather than directly to the managers to

pass on what was relevant to the projectionists, would have been slower and less efficient without serving any useful purpose. Additionally, the use of Syufy uniforms and labeled confection containers has rational bases. Such use served a security purpose and saved Norwitt money. A variety of sizes of uniforms (due to turnover of ushers) requires a large inventory of them. Actually, these things had no relationship to the conditions of employment of projectionists. If the use of logos was misleading to all, the public, not the projectionists, was misled, but the Syufy symbol on a uniform meant no more than a Ford symbol on the coveralls of a mechanic employed by a Ford dealer. The Syufy symbol on a popcorn container meant no more than the name Hershey on a candy bar. The logos on the popcorn boxes had nothing to do with the establishment or control of the labor management and labor policy

Additionally, it must be noted that the payrolls are made up from Norwitt time cards, that Norwitt has his own employer's identification from the Internal Revenue

Service, that they pay increase for projectionists at one theatre was an error by a bookkeeping clerk which was corrected by reimbursement to Norwitt and that wages were reduced at Norwitt's order. Also, the record is uncontroverted that Syufy directives are provided the Norwitt manager, to pass on to projectionists, at Norwitt's request; that conditions of employment at the Vallejo theatres are set by Norwitt; that the administration arrangement gives Norwitt the advantage of Syufy buying power; that managers are selected with Norwitt's approval; that managers hire and fire in their own discretion; and that ticket prices and the policy as to family night have been determined by Norwitt contrary to the Syufy prices and policy.

When it comes to labor relations, Syufy was given no authority by Norwitt. He assumed, with the consent of the Union, the old agreement for the balance of its term. He took the initiative to bargain for a new one and expressly separated himself from Association bargaining. He retained the right to hire and fire. He expressly arranged for the training of

managers. He had his own bank account and checks for wage payments. He made the payments to the health and welfare funds. He ordered wages reduced to his last offer when negotiations reached an impasse. He took the risks and responsibilities of an employer, not Syufy.

For the Union to try to persuade the Arbitrator to disregard all of the events in months of correspondence and its actual negotiating with Norwitt and to pretend that the Syufy Contract really governed the projectionists' employment at the two Vallejo theatres all that time is asking too much of credulity. If the Contract covered these theatres, the Union would have said so and filed an unfair labor practice charge. If the Union really believed that Syufy was the employer at the Vallejo theatres, it would not have bargained with Norwitt at all. The Arbitrator has no jurisdiction over Norwitt and cannot order him to apply the Contract. There is no proof that Norwitt is Syufy in disguise rather than an independent employer.

Therefore, the grievance must be denied.

POSITION OF UNION

Jurisdiction:

Syufy argues that the Arbitrator has no authority or jurisdiction over Norwitt or his Company that leases the two theatres. Syufy does not deny that it is operating the theatres virtually without any substantial input from Norwitt. Thus, Syufy hires the managers, establishes the booking and buying policies, decides when and under what circumstances certain films are to be shown, and holds these theatres out to the public as if they were Syufy theatres.

Additionally, it must be noted that this arbitration was held pursuant to both a grievance filed under the Contract and also pursuant to the deferral policy of the NLRB under its Collyer Insulated Wire decision. Among other things, it must be noted that the deferral of an unfair labor practice charge to arbitration under the Collyer principle can only be made if all parties to the charge agreed to proceed to arbitration. The deferral letter from the NLRB was issued on that basis, and, there-

fore, the Arbitrator has jurisdiction to decide the merits of the case.

On the Merits:

The critical issue which must be determined in this arbitration is whether or not Syufy, which admittedly operates the two theatres in question, has violated the Contract by failing to pay the wages and other benefits established pursuant to that agreement to the projectionists employed at the two theatres since March 1977.

Syufy operates the theatres pursuant to a so-called Administration Agreement in which it has full and complete management responsibilities for the booking, buying, advertising and exhibiting of motion pictures in these theatres. Moreover, it is interesting to note that the labor relations policies that are established at these theatres are identical to Syufy's own policies. Thus, Syufy attempted to impose a policy concerning projectionists taking certain days off, which policy was also made applicable to the theatres in question. In fact, as has not been controverted, all

the terms and conditions of employment under the predecessor Contract remained in full force and effect from April 1976, until approximately March 1977, whereupon the wages of the projectionists were drastically cut. It is interesting to note, furthermore, that the wage changes which were supposed to have gone into effect as of August 1976, were in fact implemented, at least at one of the theatres, and remained so until March 1977. The argument that the wage change was made because of some clerical error must be rejected.

Notwithstanding the claims by Norwitt, it appears that the terms of the old Contract were fully honored for the remainder of its term (April to August 1976), and thereafter the terms of the new Contract were applied at the Vallejo drive-in until March 1977. It was at that point that the wages were cut substantially, and apparently certain fringe benefit contributions ceased.

Clearly, the method and manner under which these theatres are being operated requires a conclusion that Syufy is the operator and must then operate in accordance with the Contract. For all intents

and purposes, both in fact and in law, the theatres are operated as part of the Syufy chain. What Syufy is attempting to do is to avoid obligations under a collective bargaining agreement to which it is admittedly bound. The plain fact of the matter is that Syufy operates these theatres under either its management contract or some other form as if they were part of the Syufy chain with no changes whatsoever occurring in the terms and conditions of employment of the projectionists.

Thus, the projectionists' employment remained constant without any break, their wages and other conditions remained the same for about ten months, and the only difference that has been shown to have occurred was that their pay checks were given on a check bearing a different name but with the same business address as Syufy. In fact, nothing in the operations of the theatres would appear to have changed, and, most significantly, from approximately April 1976, until March 1977, nothing occurred relative to the wages, hours, and terms and conditions of employ-

ment of the projectionists employed at these theatres which would indicate that somehow they were going to be treated differently because of the lease agreements.

It is interesting to note that one of the arguments raised by Syufy is that the Administration Agreement is not unusual in this industry. By making this argument, Syufy apparently suggests that the mere fact there is a management contract means that they are no longer bound by the Contract. What Syufy fails to point out, however, is that under all the circumstances of where it is operating as a manager of a theatre in partial ownership with other enterprises, the Contract is, nonetheless, being applied. Thus, notwithstanding this apparent practice in the industry, it must be noted that where Syufy operates as a manager in Northern California, the Contract is applied.

In this situation, Syufy has acted in the same manner as another theatre employer in Northern California did in Transcontinental Theatres, Inc., 216 NLRB No. 187, in which a theatre employer purported to lease out its theatre to a partnership.

The NLRB held that because of the method and manner in which the arrangement took place and the control that the lessor maintained over the operations of the theatre, that such an arrangement was contrary to the National Labor Relations Act. Moreover, it has been held in this circuit that an employer cannot avoid a collective bargaining obligation by ostensibly going out of business while in fact retaining substantial control of the enterprise. (See NLRB v. Lewis, 246 F.2d 886 (9th Circuit 1957).

In analogous situations in the construction industry, the NLRB and the Courts have held that close relationships between two claimed separate companies have been sufficient to establish that the collective bargaining agreement of one may also be applied to the operations of the others. The key factors that must be analyzed are the questions of control of day-to-day operations, interrelationship of the business enterprise with others, control of labor relations and the like. In this case, it is obvious that except for the fact that Norwitt is the lessee of the

premises, there is simply no evidence whatsoever that he is involved in the day-to-day operations of the two theatres. Syufy has total involvement in the operations and management of the theatres, hires and fires the employees and managers, and apparently imposes its own policies upon the operations of the theatres. It receives a fee for these services and a percentage of the gross over certain levels based upon the lease arrangement. For all intents and purposes, Syufy is attempting to use the subterfuge of a lease and an Administration Agreement as a means to avoid its obligations under the Contract.

The facts of the matter are that the projectionists were never informed of the change in their employer, were never terminated and never suffered any changes in the terms and conditions of their employment from approximately April 1976, until March 1977. Furthermore, wage increases which were due under the new Contract were in fact applied, and as late as February 1977, Syufy management directives were imposed upon the projectionists working in these theatres. Save and

except the fact that the theatres are apparently leased by Norwitt, there is simply no other connection between him and these operations. And notwithstanding purported terms of the Administration Agreement to the contrary, it is obvious that the labor relations and policies that are established at these theatres are identical to those that are established at other Syufy houses.

The grievance should be found meritorious and Syufy should be ordered to reinstate all terms and conditions that have been denied the projectionists and to make them whole for any losses in pay or benefits which may have occurred because of the Contract violations.

OPINION

Jurisdiction:

Clearly, the Arbitrator has no jurisdiction over Norwitt. He is not a party to the Contract under which this arbitration arises, he did not take part in the processing of the grievance through the Contract grievance procedure and he was not a party to the arbitration itself.

Equally clearly, however, the Arbitrator does have jurisdiction over Cine 21 and Vallejo Auto Movies. Such jurisdiction exists not only in consequence of the intent of the parties during negotiations to have the dispute concerning these theatres, as well as others, determined outside of negotiations, but also by way of the NLRB's deferral policy under the Collyer decision. Having expressed a willingness to arbitrate, thereby allowing the NLRB to defer the matter pursuant to its deferral policy, the Employer cannot now be heard to assert that the Arbitrator lacks jurisdiction over the two theatres in question.

Thus, while the Arbitrator does not have jurisdiction over Norwitt, jurisdiction does exist over Cine 21 and Vallejo Auto Movies.

On the Merits:

The narrow view taken by the Employer with respect to the Arbitrator's authority is, under the particular facts and circumstances of this case, restrictive and unreasonable. True, as a general proposition an arbitrator's authority flows from

and is limited to the collective bargaining agreement between the parties. However, in consequence of the very nature of this dispute, it cannot be reasonably argued that the Arbitrator must not venture beyond the four corners of the Contract. To sustain that argument would render illusory the arbitration process in this dispute and would fly in the face of the intent of the parties during negotiations and the NLRB's deferral to arbitration of the unfair labor practice charge.

The Employer asserts, inter alia, that the negotiations with Norwitt is inconsistent with the Union's position in this case. That argument is not persuasive. Certainly, it is not unreasonable, indeed, it is quite common, for alternative positions and/or arguments to be advanced in a particular dispute. Clearly, in an effort to avoid possible protracted litigation, it was reasonable for the Union to attempt to obtain an agreement with Norwitt. Had that been accomplished, no dispute would now exist. To say that its negotiations with Norwitt were inconsistent with the Union's present position is to assert that a party

must take one course of action without resort to other avenues in an effort to resolve a dispute. Moreover, the Union did protect itself by reserving its rights as it did.

When all is said and done, the case really comes down to whether an employer, by a Lease and Administration Agreement, can avoid its obligations under a collective bargaining agreement. Under the facts and circumstances of this case, the Arbitrator concludes that it cannot. Clear record evidence exists that there has been no substantial change in the manner in which the two theatres are operated. For the most part, Syufy is doing precisely what it did prior to the execution of the Leases and Administration Agreement on April 15, 1976. The insubstantial input from Norwitt clearly demonstrates that it is Syufy that is operating these theatres in all respects, notwithstanding the limitation as regards labor relations matters.

Additionally, if inconsistencies do exist in this case they exist with equal force from the Employer's point of view as

from the Union's. Thus, approximately two weeks after execution of the Leases and Administration Agreements, the Union asked for certain information in preparation for negotiations (UX 6(a)). In answering that request, Syufy listed 35 theatres, including the two theatres involved herein. Moreover, approximately one month after execution of the Leases and Administration Agreements, Syufy's Director of Operations sent the information requested by the Union concerning the wages, hours and gross pay of the projectionists at the particular theatres, and included therein was such information with respect to the projectionists at the two theatres involved in this dispute. (UX 6(e)).

Moreover, it is interesting to note that some two and a half months after execution of the Leases and Administration Agreement, Syufy executed an agreement dated June 29, 1976, between it and the City of Vallejo having to do with certain restrictions to the Business License issued by the City (EX 25, Item 1). Those restrictions were not acknowledged by Norwitt until August 6, 1976, some four months

after execution of the Leases.

Record evidence does exist that such Administration Agreements as are involved herein are common in the industry; however, it is uncommon in the industry for theatres subject to such Agreements to be withdrawn from coverage under the Contract. Indeed, at least one such attempt under like facts and circumstances has been rejected by the NLRB. See Transcontinental Theatres, Inc., 216 NLRB No. 187. With the exception of signing payroll checks and insignificant, indeed almost nonexistent, input from Norwitt with respect to the operations of the theatres and labor relations matters, Syufy's control and management over the operations of the two theatres has not substantially changed.

Thus, in consequence of the Employer's substantial day-to-day control over the operations of the theatres in question, the Contract applies to Cine 21 and Vallejo Auto Movies. Syufy shall reinstate all terms and conditions that have been denied the projectionists at the two theatres and shall make them whole for any losses in pay

or benefits which may have occurred.

AWARD

1. The Arbitrator does not have jurisdiction over Norwitt. The Arbitrator does have jurisdiction over Cine 21 and Vallejo Auto Movies.

2. Joint Exhibit No. 1 applies to Cine 21 and Vallejo Auto Movies. Syufy shall reinstate all terms and conditions that have been denied the projectionists at the two theatres and shall make them whole for any losses in pay or benefits which may have occurred.

Dated: August 10, 1977.

ARMON BARSAMIAN
Arbitrator